

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 2:15-CR-62 JCM (CWH)

Plaintiff(s),

ORDER

v.

JOHN THOMAS, et al.

Defendant(s).

Presently before the court are Magistrate Judge Carl Hoffman's report and recommendation (doc. # 90) that this court deny defendant John Thomas III's ("Thomas") motions to suppress evidence derived from (i) the seizure of a firearm; (ii) statements Thomas made before his arrest; and (iii) seizure of Thomas' cellular phone. (Doc. ## 74, 75, and 78).¹ Defendant filed objections to Judge Hoffman's report and recommendation. (Doc. # 93). The United States filed a response to the objections. (Doc. # 94).

I. Background

The superseding indictment charges Thomas with two crimes on two counts: (1) conspiracy to possess a controlled substance—marijuana—with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), and 846 (count 1); and (2) use of a firearm resulting in death during and in relation to a crime of drug trafficking in violation of 18 U.S.C. §§ 2, 924(c)(1)(A), and 924(j) (count 2).

Thomas' three motions to suppress seek to preclude the government's use of all tangible evidence of the charges against him. He contends that his Fourth and Fifth Amendment rights were violated because (i) police seized a firearm from his Mercedes Benz vehicle without a warrant or

¹ The government filed a response in opposition to each motion to suppress. (Doc. ## 80, 81, and 83).

1 his consent; (ii) police failed to advise him of his *Miranda*² rights when he was interrogated at the
 2 police station; and (iii) police seized his cellular phone without a warrant after he was interrogated.
 3 (See doc. ## 74, 75, and 78). The government responds that Thomas consented to the search that
 4 resulted in the seizure of the firearm, that he was not in custody during his interrogation, and that
 5 the cellular phone was seized incident to his arrest, and was later searched pursuant to a valid
 6 search warrant. (See doc. ## 80, 81, and 83).

7 Judge Hoffman conducted an evidentiary hearing on September 30, 2015. (See mins. of
 8 proceedings, doc. # 86); (tr. of proceedings, doc # 89). Judge Hoffman found (i) that Thomas
 9 consented to seizure of the firearm in question and never revoked that consent; (ii) Thomas was
 10 not in custody during the interview at the police station; thus the statements he made there should
 11 not be suppressed; and (iii) the cellular phone was properly seized during Thomas' arrest after the
 12 interview.

13 Thomas now objects to those findings. (Doc. # 93). First, the defendant objects to Judge
 14 Hoffman's credibility findings with respect to the testimony elicited at the evidentiary hearing. (*Id.*
 15 at 3). He objects further to the magistrate judge's finding that he was not in custody during the
 16 police station interview. (*Id.* at 3–5). Finally, he contests Judge Hoffman's finding that seizure of
 17 his cellular phone incident to his arrest was proper. (*Id.* at 5).

18 **II. Undisputed Facts**

19 *A. Seizure of the firearm*

20 Late in the evening of November, 30, 2013, North Las Vegas Police Department
 21 ("NLVPD") officers paid a visit to the home of John Thomas, Jr. ("Mr. Thomas"), defendant's
 22 father. The officers were investigating a homicide at an apartment on Cheyenne Avenue in Las
 23 Vegas, Nevada. During the investigation, police found evidence of pistol and shotgun use at the
 24 scene of the crime. Officers also located a Honda Accord vehicle near the apartment, which
 25 appeared to have been sprayed with shotgun pellets. That vehicle was registered to Mr. Thomas.

26 When the NLVPD officers arrived at his home, Mr. Thomas advised them he did indeed
 27 own the vehicle, but that it was primarily used by his son, the defendant in this matter. At the
 28 officer's request, Mr. Thomas contacted the younger Thomas and asked him to come to the home.

² See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

1 Thomas arrived approximately twenty to thirty minutes later. At some point in the meantime, Mr.
2 Thomas advised the officers that the younger Thomas owned a firearm.

3 Upon his arrival, officers asked Thomas if he owned a firearm. Thomas confirmed that he
4 owned two firearms and informed the officers that one of them, a Glock 30, caliber .45, was in a
5 Mercedes Benz vehicle he owned. The vehicle was parked in the driveway. Thomas showed the
6 officers the car and indicated to them the location of the gun, which was in plain view.

7 Officer Gomez then asked Thomas for permission to search the car. After verbally
8 consenting to the search, Thomas agreed to complete a written consent to search form. Out of an
9 abundance of caution, Officer Gomez asked Thomas to make a handwritten statement. Thomas
10 complied, signing a statement that reads, “out of my own free will, I give the North Las Vegas
11 Police Department permission to take the Glock 30 from the car.” At some time after that, criminal
12 investigators from the NLVPD arrived and seized the firearm in question.

13 *B. Thomas’ statements during the interview at the police station*

14 After seizure of the firearm, Office Gomez asked Thomas if he would be willing to talk to
15 someone at the police station. Thomas was told that he was not required to go and that he was free
16 to leave. Thomas did go to the police station. He was interviewed there by Detective Mark
17 Suranowitz. (*See generally* doc. # 81-1). Thomas was advised that the interview was voluntary,
18 that he was free to leave at any time, and that the officers would take him home at his request. (*See*
19 doc. # 81-1, lines 54–75).

20 Thomas and Detective Suranowitz discussed the events of the previous day for
21 approximately one hour. During that interview, Thomas made potentially incriminating
22 statements. At one point, he admitted that he had fired the Glock 30 described *supra* in the parking
23 lot of the apartment complex where the alleged homicide occurred. (*See* doc. # 81-1, lines 408–50).

24 *C. The cellular phone seizure*

25 After the interview with Detective Suranowitz, Thomas was arrested for unlawfully
26 discharging a firearm in a public area. Suranowitz seized the cellular phone in question pursuant
27 to that arrest.

28 **III. Legal Standards**

A. Objection to a magistrate judge’s report and recommendation

A party may file specific written objections to the findings and recommendations of a
United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);

1 LR IB 3-2. Where a party timely objects to a magistrate judge's report and recommendation, the
 2 court is required to "make a *de novo* determination of those portions of the [report and
 3 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). The court "may accept,
 4 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."
 5 *Id.*

6 Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of
 7 a magistrate judge within fourteen days from the date of service of the findings and
 8 recommendations. LR IB 3-2(a). Similarly, Local Rule 7-2 provides that a party must file an
 9 opposition to a motion within fourteen days after service of the motion. LR 7-2.

10 *B. Consent to a warrantless search*

11 Reasonableness is the foundation of Fourth Amendment jurisprudence. *Florida v. Jimeno*,
 12 500 U.S. 248, 250 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)). "The Fourth
 13 Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those
 14 which are unreasonable." *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). Consensual
 15 searches are allowed because it is reasonable for law enforcement agents to conduct a search after
 16 receiving consent. *Id.* at 250-51. "A suspect is free, however, after initially giving consent, to
 17 delimit or withdraw his or her consent at anytime [sic]." *United States v. McWeeney*, 454 F.3d
 18 1030, 1034 (9th Cir. 2006).

19 The government has the burden of demonstrating that consent to a warrantless search was
 20 voluntary. *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997). Voluntariness is
 21 "'to be determined from the totality of all the circumstances.'" *Id.* (citing *Schneckloth v.*
 22 *Bustamonte*, 412 U.S. 218, 227 (1973)). In the Ninth Circuit, district courts generally consider five
 23 factors in assessing voluntariness: "(1) whether defendant was in custody; (2) whether the arresting
 24 officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the
 25 defendant was notified that she had a right not to consent; and (5) whether the defendant had been
 26 told a search warrant could be obtained." *United States v. Payayan Soriano*, 361 F.3d 494, 502
 27 (9th Cir. 2003). These factors "are only guideposts, not a mechanized formula to resolve the
 28 voluntariness inquiry." *Id.* at 502. "[I]t is not necessary for all five factors to be satisfied in order
 to sustain a consensual search." *United States v. Cormier*, 220 F.3d 1103, 1113 (9th Cir. 2000);
see also Patayan-Soriano, 361 F.3d at 502 (reiterating that "[n]o one factor is determinative in the
 equation").

1 C. *Miranda rights during a police interrogation*

2 The obligation to administer *Miranda* warnings attaches once a person is subject to
 3 “custodial interrogation.” *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). “Whether a suspect is in
 4 custody turns on whether there is a formal arrest or restraint on freedom of movement of the degree
 5 associated with a formal arrest.” *U.S. v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir. 2005).
 6 “In determining whether an individual was in custody, a court must examine all of the
 7 circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was]
 8 a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.”
Stansbury v. California, 511 U.S. 318, 322 (1994).

9 The question is whether a “reasonable innocent person in such circumstances” would
 10 understand that he could refuse to answer officers’ questions and leave. *United States v. Booth*,
 11 669 F.2d 1231, 1235 (9th Cir. 1981). Facts relevant to the determination of whether a person is in
 12 custody “include the language used by the officers, the physical characteristics of the place where
 13 the questioning occurs, the degree of pressure applied to detain the individual, the duration of the
 14 detention, and the extent to which the person was confronted with evidence of guilt.” *United States*
 15 *v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007) (quotation omitted); *see also Howes v. Fields*,
 16 132 S.Ct. 1181, 1189 (2012) (setting forth a non-exhaustive list of factors that are pertinent to the
 17 determination whether a reasonable person would have believed he could freely walk away from
 the interrogators).

18 D. *Seizure incident to arrest*

19 A police officer who makes a lawful arrest may conduct a warrantless search of the
 20 arrestee’s person and the area “within his immediate control.” *Chimel v. California*, 395 U.S. 752,
 21 763 (1969). Such a search is conducted for the twin purposes of finding weapons the arrestee might
 22 use or evidence the arrestee might conceal or destroy. *Preston v. United States*, 376 U.S. 364, 367
 23 (1964). In the Ninth Circuit, the determination of the validity of search and seizure incident to
 24 arrest is a two-fold inquiry: (1) was the searched or seized item “within the arrestee’s immediate
 25 control when he was arrested” and (2) did “events occurring after the arrest but before the search
 ma[k]e the search unreasonable?” *United States v. Turner*, 926 F.2d 883, 887 (9th Cir. 1990).

26 **IV. Discussion**

27 Each of defendant’s objections to Judge Hoffman’s report and recommendation will be
 28 discussed in turn.

1 A. *Credibility findings regarding revocation of consent*

2 During the September 30, 2015, evidentiary hearing, Thomas admitted that he consented
3 orally and in writing, as described above, to the search of his Mercedes vehicle and the seizure of
4 the Glock 30 in question. He also testified, however, that he later revoked that consent. He contends
5 that after signing the statement and the form, he told officers he needed a lawyer and that he did
6 not want to consent to any search, but instead just wanted to make a statement. (Doc. # 90 at 4).
7 All three NLVPD officers that were at the Thomas home testified that they were “with Thomas
8 while waiting for the criminal investigators to arrive to conduct the search of the Mercedes and
9 that at no time did Thomas withdraw his consent.” (Doc. # 90 at 3).

10 Thomas does not object to Judge Hoffman’s finding that “[b]ased on the totality of the
11 circumstances and evidence presented, . . . Thomas voluntarily and without coercion consented to
12 the search of the Mercedes and the seizure of the Glock 30, which was in plain view within the
13 Mercedes.” (Doc. # 90 at 6). Reviewing Judge Hoffman’s findings and conclusion, this court
14 agrees. Applying the *Pagayan* factors, Judge Hoffman found that: (1) Thomas was not in custody
15 and did not reasonably believe he was in custody; (2) the officers never drew their service weapons;
16 (3) the officer did not administer *Miranda* warnings; (4) the consent form Thomas signed indicated
17 that he had the right to refuse consent to the search; and (5) Thomas was never told that a search
18 warrant would be obtained if he refused to consent or that his refusal was futile. *See Pagayan*, 361
19 F.3d at 502; (doc. # 90 at 5–7).

20 In addition, Judge Hoffman found that, contrary to Thomas’ arguments in his motion to
21 suppress, he was not under stress from the shotgun wound he had suffered earlier that day or under
22 the burden of immaturity at the time he gave consent. This court finds that those facts are supported
23 by the record and therefore adopts Judge Hoffman’s conclusion that consent to the search was
24 voluntary and free of coercion.

25 The court must next determine whether Thomas revoked consent to the search prior to the
26 criminal investigators seizing the firearm in question. *See McWeeney*, 454 F.3d at 1034. The
27 magistrate judge observed that: “Thomas’s testimony is in stark contrast with that of the three
28 officers on the scene, each of whom testified that Thomas did not at any time revoke his consent.
The [c]ourt therefore must make a credibility determination as to the evidence on this point.” (Doc.
90 at 7).

1 Judge Hoffman then analyzed the testimony given by Thomas and the three NLVPD
 2 officers at the evidentiary hearing. Ultimately, he determined that the officers' testimony that
 3 consent was never revoked was more credible than Thomas' testimony that he did revoke his
 4 consent:

5 Officers Gomez, Silva, and Wall each testified that they were present with Thomas while
 6 they waited for criminal investigators to arrive to seize the Glock 30, and the officers
 7 appeared to have clear recollections of the events that evening. Officer Gomez additionally
 8 testified that if Thomas had revoked his consent, he would have honored the withdrawal.
 9 Similarly, Officer Silva testified that if Thomas had withdrawn consent, they would simply
 10 have called for detectives to obtain a search warrant. Officer Gomez had been thorough in
 11 obtaining Thomas's consent because he was investigating a homicide and wanted to
 "solidify" the consent by obtaining multiple forms of consent, and testified that he would
 not have ignored a comment by Thomas that he revoked his consent. Thomas, on the other
 hand, has cause to fabricate his story because he is facing prosecution for serious offenses
 which turn on the admissibility of the Glock 30. Additionally, Thomas's claim that he was
 initially handcuffed when he arrived at the house was not credible, which detrimentally
 impacts this Court's view of his credibility. The Court therefore finds that Thomas's
 testimony is not credible, and that he did not revoke his consent.

12 (Doc. # 90 at 7).

13 Thomas now argues that the magistrate Judge "assum[ed] the defendant would testify
 14 falsely merely because he is accused of serious crimes." (Doc. # 93 at 3). As the text quoted above
 15 indicates, Judge Hoffman based his credibility determination on much more than that. (*See* Doc. #
 16 90 at 7). First, all three officers' testimony was consistent. (*Id.*) Moreover, Officer Gomez testified
 17 credibly that due to the serious nature of the investigation, he took extra precaution in following
 18 proper procedure. (*Id.*) Officer Silva indicated that had consent been revoked, he would have called
 19 detectives to obtain a search warrant. (*Id.*) Finally, the determination was based in part on the fact
 20 that the magistrate judge had already found Thomas' testimony regarding handcuffing was not
 credible for similar reasons. (*Id.*)

21 Thomas argues further that courts in other circuits have found that it would be unreasonable
 22 for a man who maintains his innocence to be willing to let police search a car that he knew to
 23 contain inculpatory evidence. *See Higgins v. United States*, 93 U.S. App. D.C. 340, 341. The court
 24 will not upset a magistrate judge's credibility determination by substituting its own or any other
 25 court's subjective belief about the reasonableness of consenting to a given search for that
 26 magistrate judge's determination made after conducting an evidentiary hearing and a competent
 analysis of the testimony.

27 The court will adopt Judge Hoffman's determination that Thomas' testimony *was not*
 28 credible and that the NLVPD officers' testimony that he never revoked his voluntary consent *was*

1 credible. Thomas did not revoke his consent. Accordingly, the Glock 30 firearm in question was
 2 seized based upon Thomas' voluntary consent, and it will not be suppressed. (Doc. # 90 at 7).

3 *B. The statements taken at the police station*

4 Defendant objects to Judge Hoffman's finding that the interrogation was custodial. Thomas
 5 argues that any representations by the three NLVPD officers that the interrogation was voluntary
 6 and that Thomas could leave when he wanted to were illusory. He argues that the representations
 7 the officers made about the voluntary nature of the interview were designed to circumvent the
 8 defendant's *Miranda* rights and the officers always intended to arrest Thomas.

9 The defendant argues that his arrest subsequent to the interview distinguishes Thomas'
 10 interview from those in the cases cited by Judge Hoffman in the report and recommendation.³ *See*
 11 *Oregon v. Mathiason*, 420 U.S. 492, 495 (1977) (finding that a defendant who voluntarily went to
 12 the police station, was immediately informed that he was not under arrest, and after the interview
 13 did in fact leave the station, was not in custody); *see also United States v. Crawford*, 372 F.3d
 14 1048, 1059-60 (9th Cir. 2004) (en banc) (finding no custody when defendant agreed to go to the
 15 FBI office and was told that he was not under arrest).

16 The courts in those cases, however, held that "*Miranda* warnings are required only where
 17 there has been such a restriction on a person's freedom as to render him 'in custody.'" *Mathiason*,
 18 420 U.S. at 495; *see also Crawford*, 372 F.3d at 1059. The focus of the inquiry in both cases was
 19 on whether the restrictions of freedom in place at the time of the interview amounted to custody.
 20 *See id.* In fact, in *Crawford*, the Ninth Circuit found that the defendant's interview with law
 21 enforcement was non-custodial *in spite of* finding that he had been illegally detained by officers
 22 earlier that day:

23 [d]efendant concentrates on what happened at his home. He argues that, because he was
 24 detained during the parole search and officers had entered his bedroom with weapons
 25 drawn, his later questioning at the FBI office amounted to custodial interrogation.
 26 However, that detention ended when Defendant agreed to go to the FBI office. The "in
 27 custody" *1060 determination requires us to examine the "circumstances surrounding the
 28 *interrogation*," which did not occur in Defendant's home. *Thompson v. Keohane*, 516 U.S.
 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (emphasis added). What took place in
 Defendant's home did not transform the later events at the FBI office into custodial
 interrogation.

Crawford, 372 F.3d at 1059–60.

³ Thomas was arrested after the interview for discharge of a firearm in public based on his admission that he did so during the interview.

1 Similarly, Thomas arrest subsequent to the interview did not transform the prior events
 2 during the interview into a custodial interrogation. Defendants cite no case law that indicates that
 3 the district court should inquire into either the events that transpired after the interview *or* the
 4 subjective intent of the officers with respect to making an arrest in its inquiry regarding the
 5 custodial nature of an interview. Similarly, the court finds no such authority. The fact that Thomas
 6 was arrested after the interview for a crime he admitted to committing during the interview has no
 7 bearing on whether the interview was custodial in nature. The court will not speculate about the
 8 subjective mindset of the detectives and officers involved.

9 Judge Hoffman conducted a thorough review of the testimony related to the voluntary
 10 nature of the interrogation. He found that all three NLVPD officers testified that “Thomas
 11 voluntarily presented himself for a police interview after being told, and indicating that he
 12 understood, that he was not under arrest did not have to go to the police station, was free to leave
 13 at any time, and that officers would take him home.” (Doc. # 90 at 10). Furthermore, when the
 14 interview commenced, Detective Suranowitz again told Thomas that he was free to leave at any
 15 time and the officers would take him home. (Doc. # 90 at 10); (*see* doc. # 81-1, lines 54–61).

16 To this point, defendant argues that he testified that he never actually believed he could
 17 leave, making the interview custodial. Here, Thomas’ subjective belief about whether he could
 18 leave has no bearing. *See Booth*, 669 F.2d at 1235. The question is instead whether a “reasonable
 19 innocent person in such circumstances” would understand that she could refuse to answer officers’
 20 questions and leave. *Id.* The court finds that given the totality of the circumstances, a reasonable
 21 innocent person in those circumstances would understand that she was not under custody. Judge
 22 Hoffman’s conclusion that defendant was not in custody during the interview will therefore be
 23 adopted in full. Thus, the statements Thomas made during the interview will not be suppressed.

24 C. *Seizure of the cellular phone*

25 After conducting the appropriate inquiry under *Turner*, Judge Hoffman found that:

26 the cellular telephone was on Thomas’s person, and there were no intervening events to
 27 make the seizure unreasonable. Thomas makes no contrary argument. Nor does he argue
 28 that his arrest was illegal. The Court finds that the cellular telephone was seized from
 Thomas’s person and there was probable cause to arrest him for unlawfully discharging a
 firearm in a public area.

(Doc. # 90 at 12); *see Turner*, 926 F.2d at 883.

1 Defendant now argues that the search was *not* lawful. He argues that the seizure of the
 2 Glock 30 and the interrogation at the police station prior to the arrest were not lawful. (Doc. # 93
 3 at 5). He argues that because the interrogation was unlawful, no probable cause to arrest defendant
 4 existed for the crime he admitted to committing during the interview existed. (*Id.*) The court has
 5 already found that the seizure of the Glock and the non-custodial interview at the police station
 6 were lawful. It therefore adopts Judge Hoffman's finding that there was probable cause for the
 7 arrest.

8 In the alternative, Thomas argues that the seizure of the cellular phone incident to arrest
 9 was inappropriate because the cellular phone is not a dangerous weapon. It is indisputable that the
 10 cellular phone was not a dangerous weapon. It is also indisputable, however, that the cellular phone
 11 contained evidence that Thomas might conceal or destroy. *See Preston*, 376 U.S. at 367. Seizure
 12 was therefore appropriate. *Id.*

13 Defendant does not contest the validity of the search warrant obtained to investigate the
 14 phone's contents. Having conducted a *de novo* review of Judge Hoffman's remaining findings with
 15 respect to the cellular phone seizure, the court finds good cause to adopt the findings in full.
 16 Accordingly, the court finds that the cellular phone was properly seized from Thomas incident to
 17 a lawful arrest, and the cellular phone evidence will not be suppressed.

18 **V. Conclusion**

19 The court has reviewed defendant's objections to the report and recommendation, and
 20 conducted a *de novo* review of Judge Hoffman's report and recommendation. Having done so, the
 21 court finds good cause to adopt the report and recommendation in their entirety.

22 Accordingly,

23 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judge Hoffman's report
 24 and recommendation (doc. # 90) be, and the same hereby are, ADOPTED in their entirety.

25 IT IS FURTHER ORDERED that defendant John Thomas III's motion to suppress the
 26 seizure of a firearm (doc. # 74) be, and the same hereby is, DENIED.

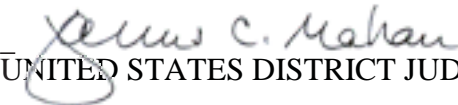
27 IT IS FURTHER ORDERED that defendant John Thomas III's motion to suppress
 28 statements (doc. # 75) be, and the same hereby is, DENIED.

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1 IT IS FURTHER ORDERED that defendant John Thomas III's motion to suppress the
2 cellular phone and contents (doc. # 78) be, and the same hereby is, DENIED.

3 DATED February 5, 2016.

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5 UNITED STATES DISTRICT JUDGE
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